Towards a harmonised tort law in Europe? An economic perspective

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§ 1. Introduction: the Contribution of Law and Economics to Harmonization Issues

In this editorial I will briefly address the possible contribution of the economic analysis of law to the debate concerning the need for a harmonization of tort law in Europe. The focus will indeed mainly be on this harmonization issue. It is important to stress this since the economic analysis of law could be useful to a study of European integration at various levels.

A. Search for Principles

First of all, the main advantage of the economic analysis of tort law has been that it makes it possible to focus on the economic functions of a system of accident law. Thus economic analysis enables an analysis of the basic principles underlying many tort systems in Europe. For instance economic analysis can explain why many European tort systems have chosen a strict liability regime for hazardous activities and have kept a negligence/fault regime for non-hazardous activities. By focusing on these basic ideas which underlie tort law in many legal systems, economic analysis can contribute to European integration. Indeed, it is precisely by focusing on the basic economic notions behind a tort system, that the comparative lawyer is able to discover whether differences between legal systems merely relate to legal technique or whether the differences are the result of differing values and preferences. Often the differences in legal technique are linked to different legal traditions; they have grown as a result of the doctrinal habits in a specific legal system. This is not to say that these technical/dogmatic differences are unimportant. However, in some cases economic analysis of law can show that although there may be huge differences between various legal systems as far as the legal form and technique is concerned, the underlying values and principles may be similar. By focusing on the basic principles of tort law, economic analysis may in some cases show that differences between a variety of legal systems are not as huge as are imagined. The flip side is that the economic analysis of tort law indeed simplifies the

working of tort law by not addressing the details of the legal technique but by specifically focusing on the functions and goals that tort law might wish to achieve. Some lawyers would argue that focusing on principles and neglecting the details of the legal technique leads to a simplification of the tort system. That is undoubtedly to some extent the case. However, one should realize that it is precisely this simplification that, particularly from an integration perspective, is the major advantage of focusing on the underlying principles of a tort law system. This focus on underlying principles instead of on legal technique may thus enable a 'bridging of the unbridgeable'.[1]

However, within the scope of this editorial I will not focus on the basic economic analysis of tort law to illustrate this.[2] The economic analysis of tort law has in the meanwhile been well incorporated into European legal scholarship. Many traditional tort lawyers in Europe now make use of the economic arguments.[3]

B. Critical Analysis of European (Private) Law

A *second* benefit of the economic analysis of law for European integration is the simple fact that the economic methodology can be used to look critically at existing European legislation in the field of private law. Thus, economic analysis can be used to look at the efficiency of, for example, the regime provided by the European product liability directive of 25 July 1985[4] or to have a critical look at the previous draft directive on the liability for the suppliers of services.[5]

Economics uses the efficiency criterion to analyze whether a certain legal regime will promote social welfare or not. Many lawyers may argue that this can be an interesting, but not a decisive, criterion since the promotion of efficiency is certainly not the sole goal of the law. However, in this respect it is important to make a difference between the positive economic analysis of law on the one hand and normative economic analysis on the other hand. In a positive economic analysis, economics is used to analyze the economic effects of the law as it is, without necessarily indicating that efficiency is a value by which legal rules can be judged. Such a positive economic analysis can be highly useful since it often also includes effectiveness tests. Thus economic analysis makes it possible, for example, to test whether the goals set by the (European) legislator

1. See W. van Gerven, 'Bridging the unbridgeable. Community and national tort laws after Francovich and Brasserie', *International Comparative Law Quarterly* (1996), 507-544.
2. See for the basic arguments S. Shavell, *Economic analysis of accident law*, (Harvard University Press, 1987).
3. See e.g. for Germany, H. Kötz and G. Wagner, *Deliktsrecht*, (Luchterhand, 2001), 17-20.
4. For an analysis see M. Faure, 'Product liability and product safety in Europe: harmonisation or differentiation?', 53 *Kyklos* 4(2000), 467-508.
5. See M. Faure, 'Enkele rechtseconomische kanttekeningen bij de dienstenaansprakelijkheid', 2 *Aansprakelijkheid en Verzekering* 2 (1994), 33 and C. Curran, 'The burden of proof and the liability rule for suppliers of services in the EEC', 19 *Geneva Papers on Risk and Insurance* 70 (1994), 85-98.

can actually be achieved with the instruments used. This information is obviously useful for any assessment of a legal framework. In a normative economic analysis, efficiency is used as a criterion to judge legal rules. Many lawyers may have more difficulties with this. But even if one accepts that law can serve purposes other than efficiency, economic analysis can still provide useful information on, for instance, costs and benefits of a specific legal regime. It is precisely in this way that I think that economic analysis can provide an interesting contribution to legal theory.

C. Division of Labour in Federal Systems

The *third* way in which economic analysis can be useful for European integration is that economics has given a lot of attention to the division of competences within federal systems. This is a topic which, from a European legal perspective, obviously concerns the subsidiarity principle. From an economic perspective, the question that is addressed in the economics of federalism is what would be the optimal level for specific types of regulation. I believe that this literature is highly useful also for addressing the harmonization debate with respect to tort law. Economists have indeed paid a lot of attention to the potential goals, functions and economic effects of a harmonization of law.[6]

The economic criteria in favour of or against centralization of decision making can indeed also be applied to a few specific domains of tort law, in particular environmental liability, product liability and medical malpractice. In each of these cases, it is possible to analyze what the possible benefits may be of harmonization efforts. Moreover, economic analysis may also be able to address the desirability of harmonization with respect to some specific issues of tort law such as the choice between strict liability and negligence or the desirability of compensation for non-pecuniary losses.

The reason for providing more specific examples in the domains of environmental liability and product liability is relatively clear: those are two areas where we can typically expect 'transboundary torts', which means that the argument in favour of harmonization may be stronger in those areas. Moreover, product liability has so far been one of the only areas where the European Commission has successfully enacted legislation leading to a (partial) harmonization of private law. With respect to

6. This has also been addressed in earlier research in which the harmonization efforts were analyzed from an economic angle with respect to environmental law (M. Faure, 'Harmonization of Environmental Law and Market Integration: Harmonizing for the Wrong Reasons?', 7 *European Environmental Law Review* 6 (1998), 169-175), environmental liability (M. Faure and K. de Smedt, 'Should Europe harmonise environmental liability legislation?', 9 *Environmental Liability* 5 (2001), 217-237), medical malpractice (M. Faure, 'Kompensationsmodelle für Heilwesenschäden in Europa mit Ausblick auf die EG – Rechtsharmonisierung', *Zeitschrift für Europäisches Privatrecht* 3 (2000), 575-600) and product liability (M. Faure, 53 *Kyklos* 4 (2000), 467-508). The analysis in this editorial, however, broadens the issue by addressing the harmonization of tort law at a more general level.

environmental liability the European Commission is also undertaking initiatives in the direction of a (more modest) harmonization. See in this respect the well-known White Paper on Environmental Liability issued by the European Commission on 9 February 2000.[7] This recently resulted in a draft directive on the prevention and restoration of significant environmental damages. But I will also look at whether, from an economic angle, Europe should strive for a more general harmonization of tort law. This seems an interesting issue, given the many (mostly academic) initiatives that have recently been undertaken in that direction.

It seems particularly interesting to use the economics of federalism to look at the harmonization efforts in Europe because the European Commission has for a long time used economic arguments to justify its harmonization efforts. More specifically the argument has been advanced for a long time that a harmonization of law, also of private law, is necessary in order to harmonize the conditions of competition within Europe. One can wonder whether this 'economic' argument of the harmonization of competitive conditions is indeed a valid economic justification for harmonization. Moreover, applying the economics of federalism to the harmonization of tort law within Europe also has the advantage that a better balanced view can be presented of the need to harmonize tort law. Indeed, economic analysis does not come up with black or white statements favouring or opposing harmonization, but allows balanced criteria to be advanced on the basis of which it is possible to indicate what areas and what topics may be good candidates for harmonization and which may not be.

Of course the reader should be aware that applying the economics of federalism to the harmonization issue means that I will only provide 'one view of the cathedral'.[8] As was mentioned above, I am not dealing with the basic economic analysis of tort law. Moreover, in this editorial the harmonization issue is merely addressed from an economic angle. Although I have argued above that I believe that economics can provide an interesting contribution to the harmonization debate, I would like to repeat that I realize that this is indeed just one view of the cathedral. One may indeed argue that there may be other, non-economic, arguments for a harmonized liability system, such as the belief that this will lead to a higher degree of victim protection than member states would achieve when using national liability law. But even if non-economic arguments are advanced to justify a European harmonization it seems important that in

7. White Paper on Environmental Liability, COM(2000) 66 final, Brussels, 9 February 2000. For comments see P. Rice, 'From Lugano to Brussels via Arhus: Environmental Liability White Paper published', 8 *Environmental Liability* 2 (2000), 39-45; E. Rehbinder, 'Towards a community environmental liability regime: the Commission's White Paper on Environmental Liability', 8 *Environmental Liability* 3 (2000), 85-96 and M. Faure, 'The White Paper on Environmental Liability: efficiency and insurability analysis', 9 *Environmental Liability* 4 (2001), 188-201.
8. Paraphrasing the words of Calabresi and Melamed (G. Calabresi and D. Melamed, 'Property rules, liability rules and inalienability: one view of the cathedral', 85 *Harvard Law Review* 6 (1972), 1089-1128).

future European documents these reasons are clearly explained within the scope of the subsidiarity principle.

§ 2. Some Lessons from the Economic Debate

Today one can undoubtedly note a general trend among academic lawyers in favour of a harmonization of private law in Europe, including the field of tort law.[9] Symptomatic in this respect are major projects such as those focusing on a European civil code. In this editorial I will not focus on the complicated question of how such a harmonization of tort law in Europe could be achieved, nor will I focus on the actual differences between the tort laws of the European member states today. This editorial uses the economic analysis of law to focus on one specific aspect of the harmonization debate, namely the question whether there should be any harmonization at all and if so, for which topics. One indeed gets the impression sometimes that this basic question concerning the need for harmonization seems to be forgotten as a result of a great enthusiasm for the challenge of harmonization. I believe that the economic analysis of law, more specifically the economics of federalism, provides balanced answers concerning the desirability of harmonization.

A. Respecting Differing Preferences

The starting point of economic analysis is seemingly different from the one often heard in the European debate. Economists stress that differences as such are not a bad thing, provided that those differences also reflect the differing preferences of citizens.[10] If that is the case, the starting point is that these differences should be respected and that they may even contribute to the increased quality of the legal system because legal systems will compete to provide the best legal order to their citizens.[11] Of course some may argue that it is questionable whether the fact that in Portugal, for example, lower amounts are awarded for pain and suffering than in, for instance, Germany reflects the preferences of the Portuguese citizens. That is, however, dangerous reasoning. It

9. See e.g. N. Jansen, 'Auf dem Weg zu einem europäischen Haftungsrecht', *Zeitschrift für Europäisches Privatrecht* 1 (2001), 30-65; H. Koziol, 'Das Niederländische BW und der Schweizer Entwurf als Vorbilder für ein künftiges europäisches Schadenersatzrecht', 4 *Zeitschrift für Europäisches Privatrecht* 4 (1996), 587-599 and U. Magnus, 'European Perspectives of Tort Liability', 3 *European Review of Private Law* (1995), 427-444 and compare J.H. Nieuwenhuis, 'Wat is een onrechtmatige daad? Europese perspectieven', 159 *RMThemis* 8 (1998), 242-248.
10. Also some lawyers follow this line of reasoning. See e.g. J. Smits, *The good Samaritan in European private law*, (Kluwer, 2000), 43, who presents 'A praise of Diversity'.
11. A. Ogus, 'Competition between national legal systems. A contribution of Economic Analysis to Comparative Law', 48 *The International and Comparative Law Quarterly* (1999), 405-418 and see A. Ogus, 'The contribution of Economic Analysis of Law to Legal Transplants', in J. Smits (ed.), *The Contribution of Mixed Legal Systems to European Law*, (Intersentia, 2001), 27-37; R. van den Bergh, 'Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law', 5 *Maastricht Journal of European and Comparative Law* 2 (1998), 134.

questions the ability of a national legislator or judge to set damage awards according to the preferences of the citizens and it therefore basically questions the democratic nature of the decision making process in that respect. Moreover, even if one would doubt the ability of the national legislator or judge to adequately take into account the preferences of its citizens, there is still no reason to assume that Europe would do a better job in that respect. Why should we assume that the European bureaucrats in Brussels would be in a better position to know what the preferences of the Portuguese are than the Portuguese themselves? This is a paternalistic and therefore dangerous argument. Legislation that respects the different national preferences will, moreover, have the advantage of leading to a competition between legal orders.

B. Transboundary Externalities or Race for the Bottom Risk? Centralization!

It is however equally argued that in some cases this basic idea of a competition between legal orders may not provide optimal outcomes. The economic literature makes it clear that there may be an argument in favour of harmonization in case of transboundary externalities,[12] but this does not justify a total harmonization of tort law.[13] It merely calls for a regulation of transboundary accidents at a centralized level. The other economic argument in favour of harmonization is the risk of destructive competition, also referred to as the 'race for the bottom'. However, it seems very unlikely within the European context that states will compete in order to attract industry with a lenient tort law. There is no empirical evidence that European member states would engage in such a race for the bottom with an inefficient tort law. It is more likely that a race for the top would take place since states would probably first like to protect their national citizens who could be the victims of accidents.

C. Harmonization of Conditions of Competition? No!

Also the traditional 'economic' European argument that a harmonization of conditions of competition is necessary in order to create a level playing field is critically discussed in the economic literature and rejected as being wrong.[14] This argument has been used

12. Compare: A. Ogus, 48 *The International and Comparative Law Quarterly* (1999), 414 and C. Kimber, 'A Comparison of Environmental Federalism in the United States and The European Union', 54 *Maryland Law Review* (1995), 1; D. Esty, 'Revitalizing Environmental Federalism', 95 *Michigan Law Review* (1996), 625 and S. Rose-Ackerman, *Rethinking the Progressive Agenda*, (Free Press, 1992), 164-165. So S. Rose-Ackerman, *Controlling Environmental Policy. The Limits of Public Law in Germany and the United States*, (Yale University Press, 1995), 38.
13. R. van den Bergh, 5 Maastricht Journal of European and Comparative Law 2 (1998), 144-145.
14. See equally Ricky Revesz who argues that given the weaknesses of the 'harmonisation of conditions of competition'-argument 'it is not surprising that recent European scholarship has sought to characterize the quest for harmonisation in race to the bottom terms', (R. Revesz, 'Federalism and Regulation: Some Generalisations' in D. Esty and D. Geradin (eds.), *Regulatory Competition and Economic Integration, Comparative Perspectives*, (Oxford University Press, 2001), 3-29).

for a long time in Europe. To some extent this was understandable since the 'harmonization of marketing conditions' argument was necessary to give Europe competence in specific matters. However, it is doubtful that such a harmonization of marketing conditions should be strived for, since this could justify a (largely unnecessary) harmonization of any kind of legal rule, since all kinds of legislation can arguably have an influence on marketing conditions. Moreover, the initiatives that Europe has taken so far with respect to tort law have not proven to be a major success. All legal writers agree that the European Product Liability Directive, for example, could never lead to a harmonization of marketing conditions[15] and the European White Paper on Environmental Liability has not been received with great enthusiasm either, at least as far as the harmonization aspect is concerned.[16] Moreover, the European directives generally seem to have the problem that they follow the 'top down' approach, whereby the European regime is mandatorily imposed upon the member states, sometimes as an additional layer of protection, such as in the case of the European Product Liability Directive. As a result of this the Commission itself recently reported that in this area of product liability victims do not seem to use the regimes based on the European Product Liability Directive, but still largely rely on national legislation.[17] This should therefore lead to a critical review of the harmonization efforts that have been undertaken by the European Commission. Unfortunately, the Commission only seems interested in more and far-reaching harmonization instead of focusing on less (and maybe better) harmonization.[18]

D. Transaction Cost Reduction? If Possible, Yes!

It is important to stress that from an economic perspective probably the most important reason in favour of a centralization of tort law is the potential for a transaction cost reduction.[19] To some extent one can certainly argue that various tort rules in the member states reflect similar preferences and only differ as a result of differing legal techniques and dogmatics. If it were possible to align tort rules that reflect similar preferences this could certainly be considered as a gain. That is precisely the approach chosen in a variety of (predominantly privately initiated) academic projects on the

15. Almost all authors agree on that point. See H. Duintjer Tebbens, 'De Europese Richtlijn Produktaansprakelijkheid', *Nederlands Juristenblad* 12 (1986), 373-374; P. Storm, 'Een gebrekkig produkt', 10 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 85 (1985), 245; A.J.O. van Wassenaer van Catwijck, *Produktaansprakelijkheid*, in Serie Praktijkhandleidingen, (W.E.J. Tjeenk Willink, 1986), 81 and M. Martin Casals and J. Solé Feliu, 'Responsabilidad por productas en España y (des)armonizacion Europea', *Revista de responsabilidad civil y seguros* 4 (2001), 1-17.
16. See M. Faure and K. de Smedt, 9 *Environmental Liability* 5 (2001), 217-237.
17. Report on the product liability directive of 31.01.2001, COM(2000) 893 final.
18. See Green Paper on Liability for defective products, COM(1999) 396 final.
19. A somewhat related but different argument relates to economics and diseconomics of scale in administration, see S. Rose-Ackerman, *Rethinking the Progressive Agenda*, 165-166.

harmonization of tort law.[20] In most of these projects the academics involved analyze the existing differences between the various aspects of tort law in the member states and try to find a common denominator. This approach seems to be more promising than the approach chosen by the European Commission. That 'top down' approach of imposing directives on member states has so far not been very successful. The approach chosen by the academic groups focuses on the search for a Ius Commune and can therefore be called 'bottom up'. If these groups succeed in showing that the differences are merely of a technical nature and can thus be considered as meaningless incompatibilities which do not touch upon or relate to differing preferences, then this harmonization approach of searching for a common denominator may well prove to be more successful than the approach chosen by the European Commission so far.

Moreover, the work of these groups has the advantage that their proposals for a European tort law are based on a general concept of tort law. The various approaches chosen so far in the European directives are so different that it is clear that any general concept is totally lacking.[21]

The focus on the common denominator, respecting diverging national preferences and legal traditions may also more easily overcome traditional hostilities against the Europeanization of tort law in member states. Moreover, as I indicated above, it has been the approach of the economic analysis of tort law in particular to focus on the basic functions and goals of tort law. Hence, economic analysis can certainly contribute to finding a Ius Commune of tort law in Europe. Whether these groups will be successful is obviously difficult to predict. Some have stressed the importance of legal tradition and legal dogmatics.[22] Indeed, from an economic perspective one can easily argue that differing legal rules sometimes serve the same purpose and could therefore easily be harmonized. However, in some cases these are so heavily rooted in differing legal cultures and traditions that the costs of harmonization may be huge, some would

20. It is not possible to mention here all the harmonization projects with respect to private law (for an overview of all the projects see E.H. Hondius, *Towards a European civil code?*, paper presented at the Lustrum conference, at Maastricht on 25-26 October 2001 and N. Jansen, *Zeitschrift für Europäisches Privatrecht* 1 (2001), 31-65). For the area of tort law we can refer to the Principles project of the European Group on tort law, supervised by Prof. Koziol (Vienna). For an overview of their method and working see: J. Spier and O. Haazen, 'The European Group on Tort Law ("Tilburg Group") and the European Principles of Tort Law', *Zeitschrift für Europäisches Privatrecht* 3 (1999), 469-493. The other initiative is part of the project on a European civil code, co-ordinated by Prof. von Bar (Osnabrück). For an overview of their visions on the harmonization of tort law see Chr. von Bar, 'Konturen des Deliktsrechtskonzepts der Study Group on a European Civil Code', *Zeitschrift für Europäisches Privatrecht* (2000), 515-532.
21. So H. Koziol, 'Ein europäisches Schadenersatzrecht - Wirklichkeit oder Traum', *Juristische Blätter* (2001), 32-33 and P. Widmer, 'Die Vereinheitlichung des europäischen Schadenersatzrechts aus der Sicht eines Kontinental-europäers', 52 *Revue Hellénique de Droit International* (1999), 99.
22. That point has especially been made by P. Legrand, 'The impossibility of legal transplants', 4 *Maastricht Journal of European and Comparative Law* 2 (1997), 111.

argue even prohibitive.[23] From an economic perspective one can obviously only state that a harmonization based on a potential for transaction costs reduction makes sense only if the marginal costs of this harmonization effort are indeed lower than the marginal benefits of unification.[24]

§ 3. Possibilities and Limits of Harmonization: a Few Tips

Economics can however provide a few guidelines to these unification groups as far as the topics and methods of harmonization are concerned.

A. Focus on Areas where Preferences do not Differ

First, it seems important to primarily focus on those areas of tort law where preferences do not apparently differ. One could think of the choice between a strict liability regime on the one hand and negligence/fault on the other hand. If it could be established that the legal systems largely agree on the area where a strict liability regime should be applied then one could argue that the differences in form are merely technical but do not reflect varying preferences. Thus that area would be a good candidate for harmonization.[25]

The same could be argued, for instance, in relation to the weighing of interests undertaken by the judge in a negligence case when the standard of care for a particular behaviour or the wrongfulness of the behaviour of the defendant has to be established. If the groups should discover that, although the wording and dogmatics are dramatically different, the underlying methodology is similar, harmonization may again be possible.[26] However, the way in which a judge in a particular legal system will fill in this duty of care may be strongly linked to differing preferences. Thus although it would

23. See again P. Legrand, 4 *Maastricht Journal of European and Comparative Law* 2 (1997), 111.
24. So R. van den Bergh, 5 *Maastricht Journal of European and Comparative Law* 2 (1998), 146-148.
25. I certainly do not want to argue that there are no differences between the member states as far as the cases are concerned to which a strict liability rule applies. Some might argue that the differences e.g. between France and the United Kingdom in that respect are huge (for an overview see B. Koch and H. Koziol (ed.), *Unification of tort law: strict liability*, (Kluwer Law International, 2002), forthcoming and see W. van Gerven, J. Lever and P. Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law*, (Hart Publishing, 2000), 467-687 and see Chr. von Bar, *The Common European Law of Torts*, part 2, (Clarendon Press, 2000), 333-432.). The point is only made that if there were – factual – agreement e.g. on the strict liability of the guardian of a dangerous installation, this would mean that apparent preferences on that point do not differ.
26. See on that point generally H. Koziol (ed.), *Unification of tort law: Wrongfulness*, (Kluwer Law International, 1998) and for a comparison of the wrongfulness concept in Austria and Germany H. Koziol, *Juristische Blätter* (2001), 29-38 and P. Lewisch, 'A comparison of the Negligence Concept of the German BGB and the Austrian ABGB in an Economic Perspective', paper presented at the Annual conference of the European Association of Law and Economics in Vienna, September 2001, as well as C.C. van Dam, *Aansprakelijkheidsrecht. Een grensoverschrijdend handboek*, (Boom Juridische uitgevers, 2000), 143-150.

be possible to indicate what methods judges should use to establish negligence in a particular case, it may nevertheless still be possible in a medical malpractice case, for instance, that the appropriate care required of a Portuguese physician may well differ significantly from the care required of a German physician.[27] This shows that it may be possible to call for centralization, but that this centralization should not necessarily amount to harmonization.[28] The previous example shows that it would be possible, for example, to centralize the way judges deal with the negligence standard, but this could be combined with a differentiated application of the duty of care in specific cases.[29] Thus one could use a *flexible system*[30] with a harmonization of some general notions at the European level, but on the other hand a sufficient degree of flexibility to account for diverging preferences between member states. This example shows again that the question of harmonization cannot be answered with black/white statements. Some issues may be harmonized at a relative low cost whereas others (which are closely related to preferences) can be differentiated.

B. If Preferences Differ: Don't Touch!

To provide another example and guideline: one should probably be very careful when striving for harmonization in those areas of tort law which are indeed clearly linked to national preferences and values. This is probably the case for the issue of compensation for non-pecuniary losses. Here one should be very careful in calling for harmonization. First of all, the benefits of harmonization in that area should be made clear; secondly it is very likely that the costs of harmonization will be huge and thirdly, harmonization in those cases could lead to a paternalistic measure and to disrespect for the preferences of citizens. Even an appeal to the need to provide a minimum protection to all accident victims within Europe can hardly justify such a paternalistic measure.

However, with this statement and the reference to the need for providing a basic level of victim protection we have left the area of economics. Indeed, I should remind the reader

27. Comparative research has indicated that this is indeed the case. See M. Faure and H. Koziol (eds.), *Cases on Medical Malpractice in a Comparative Perspective*, (Springer, 2001).
28. This was also correctly argued in the context of environmental liability by A. Arcuri, 'Controlling environmental risk in Europe: the complementary role of an EC environmental liability regime?, 2 *TMA* (2001).
29. See, however, H. Koziol, *Juristische Blätter* (2001), 33, who argues that a harmonization effort would not suffice with mere vague notions whereby the normative choices in specific cases would be left to the national legislators or judges. Also Spier and Haazen, *Zeitschrift für Europäisches Privatrecht* 3 (1999), 484, see this problem where they argue 'the use of standards as a smoke-screen for deep disagreement creates a false consensus'.
30. This idea of a flexible system in tort law comes from the Austrian scholar Wilburg, *Die Elemente des Schadenersatzrechts*, (1941) and *Entwicklung eines beweglichen Systems im bürgerlichen Recht*, (1950). See also H. Koziol, 'Rechtswidrigkeit, bewegliches System und Rechtsausgleichung' *Juristische Blätter* (1988), 619.

once more that economics can only provide 'one view of the cathedral'. I merely address the question whether a harmonization of tort law is needed from an economic perspective. This is not totally useless in itself, since the European Commission has for a long time advanced an economic reason (harmonization of marketing conditions) to justify European action. That reason is, as I tried to show above, particularly weak.

C. No 'Harmonization of Conditions of Competition' and ...

The conclusion at the normative level, however, should not necessarily be that there should not be any European action at all with respect to tort law.[31] My main problem is that the Commission still seems to be stuck in the old jargon of the 'harmonization of conditions of competition', whereas that seems to be a weak reason for harmonization. There may be other, also non-economic reasons to justify harmonization. But then these goals and expectations should be spelled out more specifically. Even those who follow the dream of a European tort law as a political ideal (and who should realize that this may violate the preferences of citizens) can still benefit from economic analysis. Economics can help to show whether the method of harmonization chosen in a particular case can lead to the goals it proclaims to serve. Moreover, those who blindly follow an unbalanced harmonization dream should also be aware of the fact that in some cases they may (probably unknowingly) be the instruments in the hands of powerful lobby groups who can benefit from harmonization. In this respect the important lesson from the public choice school, that whenever inefficient regulatory measures are enacted there is usually a special interest group that benefits from this action, should not be forgotten.[32]

D. Take the Subsidiarity Principle Seriously!

Moreover, it seems important to take the subsidiarity principle seriously in the debate on the harmonization of tort law within Europe. Within the context of that debate attention should obviously also be given to the legal basis for justification efforts in the area of tort law. If these European legal issues are addressed more carefully (which was not the topic of this editorial) one would probably come to the conclusion that, given the subsidiarity principle, a general harmonization effort concerning tort law is problematic and that a balanced approach, focusing on (a modest) harmonization in specific areas

31. Compare J. Spier and O. Haazen, *Zeitschrift für Europäisches Privatrecht* 3 (1999), 477: 'Nor is convergence or unification of private law ever strictly speaking necessary... If we favour convergence of European private law, we deem it simply *desirable*, perhaps highly desirable, but nothing more'. This desirability of the harmonization of private law in Europe is, however, highly critized - inter alia - by J.M. Smits, 'Waarom harmonisering van het contractenrecht (via beginselen) onwenselijk is', 3 *Contracteren* 3 (2001), 73-74.
32. For a discussion of harmonization efforts in Europe from a public choice perspective see R. van den Bergh, 5 *Maastricht Journal of European and Comparative Law* 2 (1998), 148-151.

may be more warranted. The economic criteria which provide such a balanced approach to the harmonization issue could be helpful then.

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